Mohd Adli bin Maaris & Anor v Hong Leong Finance Bhd

HIGH COURT (SEREMBAN) — CIVIL APPEAL NO 12–49 OF 2003
LOW HOP BING J
22 AUGUST 2005

Civil Procedure — Judgment and orders — Judgment in default — Setting aside judgment in default — Whether delay in filing application to set aside — Whether service of summons effective — Whether first defendant prejudiced

The first defendant and the plaintiff had entered into a hire-purchase agreement ('the agreement'). When the first defendant defaulted in the payment of the instalments pursuant to the agreement, the plaintiff filed an action in the sessions court against him and served the summons to the first defendant at his address but it was returned unclaimed. The plaintiff then obtained an order for substituted service which was subsequently effected and the order for judgment in default was entered against the first defendant. The first defendant's application to set aside the default judgment was dismissed by the sessions court, therefore he appealed. The issues to be determined by the court were: (1) whether there was delay in filing the application to set aside the judgment in default; (2) whether there was effective service of the summons; and (3) whether the first defendant was prejudiced as there were two return dates on the plaintiff's summons.

Held, dismissing the appeal with costs:

(1) Since the first defendant had occasioned an inordinate, unexplained delay of at least not less than eight months, the court may refuse relief to him as an indolent litigant (see para 12).

(2) The summons and statement of claim had been sent by AR Registered post to the first defendant's address, but it had been returned unclaimed. That was the address given by the first defendant in the agreement and also in his letter to the plaintiff. Clause 14(b) of the agreement provided that any writ of summons or originating process against the first defendant shall be deemed to have been given if sent to the first defendant by prepaid registered post at the address stated in the agreement. Therefore, there was no doubt that service of the summons by way of prepaid AR registered post addressed to the first defendant was sufficient (see para 18); *Wilken Sdn Bhd v Chua Beng Hock & Ors* [2003] MLJU 756 followed.

(3) The first defendant could not be prejudiced by the return dates as the plaintiff had obtained an order for substituted service and the latest return date had been made known to the first defendant (see para 21); *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Berhad* [1996] 1 MLJ 30 distinguished.

[Bahasa Malaysia summary

Defendan pertama dan plaintif telah memasuki satu perjanjian sewa-beli ('perjanjian tersebut'). Apabila defendan pertama mengingkari pembayaran ansuran mengikut perjanjian, plaintif telah memfailkan satu tindakan di mahkamah sesyen terhadapnya dan telah menyampaikan saman kepada defendan pertama di alamatnya, tetapi telah dipulangkan tanpa dituntut. Plaintif telah memperolehi perintah bagi penyampaian ganti yang mana kemudiannya telah dilaksanakan dan perintah bagi penghakiman ingkar telah dimasukkan terhadap defendan pertama. Permohonan defendan pertama untuk mengetepikan penghakiman ingkar tersebut telah ditolak oleh mahkamah sesyen, dan oleh itu defendan pertama telah membuat rayuan. Isu yang perlu diputuskan oleh mahkamah adalah: (1) sama ada terdapat kelewatan dalam memfailkan permohonan untuk mengenepikan penghakiman ingkar; (2) sama ada terdapat penyampaian saman yang berkesan; dan (3) sama ada defendan pertama diprejudiskan memandangkan terdapat dua tarikh kembalian pada saman plaintif.

Diputuskan, menolak rayuan tersebut dengan kos:

(1) Memandangkan defendan pertama telah melakukan kelewatan yang melampau tanpa sebarang penjelasan iaitu selama tidak kurang daripada lapan bulan, mahkamah boleh menolak untuk memberi relif kepada beliau sebagai seorang yang berat tulang (lihat perenggan 12).

(2) Saman dan penyata tuntutan telah dihantar melalui pos AR Berdaftar kepada alamat defendan pertama, tetapi telah dipulangkan tanpa dituntut. Alamat tersebut adalah alamat yang diberikan oleh defendan pertama dalam perjanjian dan juga dalam suratnya kepada plaintif. Kluasa 14(b) perjanjian tersebut menyatakan bahawa sebarang writ saman atau proses pemula terhadap defendan pertama akan disifatkan sebagai telah diberikan sekiranya dihantar kepada defendan pertama melalui pos berdaftar prabayar kepada alamat yang dinyatakan dalam perjanjian. Oleh itu, tiada keraguan bahawa penyampaian saman melalui pos AR berdaftar prabayar yang dialamatkan kepada defendan pertama adalah mencukupi (lihat perenggan 18); *Wilken Sdn Bhd v Chua Beng Hock & Ors* [2003] MLJU 756 diikut.

(3) Defendan pertama telah tidak diprejudiskan memandangkan plaintif telahpun memperolehi perintah bagi penyampaian ganti dan tarikh kembalian terbaru telah dimaklumkan kepada defendan pertama. (lihat perenggan 21); *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Berhad* [1996] 1 MLJ 30 dibeza.]

Notes

For cases on setting aside judgment in default, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 349–353.

Cases reffered to

Amanah Merchant Bank Bhd v Lim Tow Choon [1994] 1 MLJ 413 (refd)
Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223 (refd)

Malayan Banking Bhd v Mahmood Zuhdi Hj Mohd Nor [2001] 6 MLJ 209 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (folld)
Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad [1989] 3 MLJ 1552 (refd)
Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Berhad [1996] 1 MLJ 30 (distd)
Wilken Sdn Bhd v Chua Beng Hock & Ors [2003] MLJU 756 (folld)

Legislation reffered to

Subordinate Courts Rules 1980 O 7 r 1(1), O 29 r 14

Appeal from: Summons No 52–1986 of 1998 (Sessions Court, Seremban)

Mohd Aidil bin Rusli (Soo Thien Ming & Nashrah) for the plaintiff.
S Ravi Chandran (Azmat Ravi & Associates) for the first defendant.

Low Hop Bing J:

Appeal

[1] This is an appeal by the appellant ('the first defendant') against the decision of the learned sessions court judge ('the trial judge') who had on 1 October 2003 dismissed the first defendant's application dated 3 March 2003 to set aside the default judgment entered against him on 29 September 1999.

Factual background

[2] The first defendant had on 14 May 1997 entered into a hire-purchase agreement ('the agreement') with the plaintiff for the hire of a Proton Wira car bearing registration number NAM 4327.

[3] Upon the first defendant's default in the payment of the instalments pursuant to the agreement, the plaintiff had filed an action in the sessions court against, inter alia, the first defendant on 12 September 1998. The first defendant's address was stated as No 7, Taman Bukit Kelana 70400 Seremban. The plaintiff had sent the summons to the first defendant at this address by way of AR Registered post on 20 October 1998 but it was returned unclaimed. That address was given by the first defendant to the plaintiff and was expressly stated in the agreement. The same address was stated in the defendant's own letters dated 1 July 2002 to the plaintiff.

[4] The original return date of the summons had to be postponed several times and the plaintiff's subsequent attempts to effect service of the same also proved unsuccessful. The plaintiff had on 5 February 1999 obtained an order for substituted service which was subsequently effected. The order for substituted service had stated that the return date of the summons was 29 September 1999, on which judgment in default was entered against the first defendant when he was absent.

[5] The first defendant had thereafter telephoned the plaintiff's office and sent facsimile and letter dated 1 July 2002 to the plaintiff in order to satisfy the judgment sum pursuant to the judgment. The first defendant had not denied this in his affidavit. He also did not deny the outstanding arrears which he had to pay on the due dates pursuant to the agreement.

Delay in filing application

[6] The plaintiff's learned counsel Mr Mohd Aidil bin Rusli raised the issue of the unexplained delay of three years and five months on the part of the first defendant in filing the application in the sessions court, relying on *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 (CA); *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223 (CA); and *Malayan Banking Bhd v Mahmood Zuhdi Hj Mohd Nor* [2001] 6 MLJ 209 (HC).

[7] Mr S Ravi Chandran, first defendant's learned counsel, responded that there was no issue of delay as the first defendant had filed the application as soon as he had notice of the judgment when he was informed by the plaintiff of the bankruptcy proceedings against the first defendant.

[8] From the appeal record, I find that the first defendant had on 1 July 2002 written twice to the plaintiff's solicitors referring to the telephone conversation between him and one Raja Nazleen bt Raja Khalid of the plaintiff's solicitors asking for consideration by the plaintiff's solicitors in relation to the repayment of the judgment sum in question, for which he agreed to repay by way of a down payment of RM5,000 and then RM500 monthly.

[9] These letters have been annexed as exhibits to the plaintiff's affidavit to which the first defendant had failed to contradict. Where, as in this case, the plaintiff makes a positive assertion upon this material issue, the first defendant's failure to contradict it is usually treated as an admission by him of the fact so asserted: *Ng Hee Thoong & Anor*, per Gopal Sri Ram JCA.

[10] In my judgment, the true position is that at all time before 1 July 2002, the first defendant had already received the judgment against him.

[11] Order 29 r 14 of the Subordinate Courts Rules 1980, where relevant, provides for the setting aside of an order or judgment as follows:

> Setting aside … judgments and orders (O 29 r 14):
>
> > Where in these rules provisions are made for the setting aside … of any order or judgment, a party intending to set aside … such order or judgment must make the application to the Court and serve it on the party who has obtained the judgment within 30 days after the receipt of the order or judgment.

[12] Since the first defendant has occasioned an inordinate, unexplained delay of at least not less than eight months (ie from 1 July 2002 when first defendant wrote to the plaintiff's solicitors to 3 March 2003 when he filed his application in the sessions court) the court may refuse relief to him as an indolent litigant: (see *Khor Cheng Wah*, per Gopal Sri Ram JCA; and *Malayan Banking Bhd*, per Suriyadi J).

Service of summons

[13] It was contended for the first defendant that he has not received the notice of demand and termination, the summons and the statement of claim, and that the plaintiff has no basis to bring the action against him, relying on clause 14(b) of the agreement ('clause 14(b)'); and *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad* [1989] 3 MLJ 155 (SC); *Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413 (SC); and *Wilken Sdn Bhd v Chua Beng Hock & Ors* [2003] MLJU 756.

[14] The plaintiff also relied on clause 14(b) and submitted that the notice of demand and termination has been served on the first defendant; so also the summons and the application.

[15] Upon a proper perusal of the plaintiff's affidavit in support and all the exhibits at pp 10–49 of the appeal record, I am unable to find any averments in relation to the non service of the notice of demand and termination. Further, this is not one of the grounds relied on in the first defendant's application at p 9 of the appeal record. In the circumstances, there is no necessity for me to consider this ground. Hence, the judgment of the then Supreme Court in *Orang Kaya Menteri Paduka Wan Ahmad Shukri*, requiring the service of an antecedent demand in a guarantee there is not helpful to the first defendant.

[16] In relation to the ground that the first defendant had not received the plaintiff's summons and statement of claim, the true position is that the summons and statement of claim had been sent by AR Registered post on 20 October 1998 to the first defendant's address, but it had been returned unclaimed. That was the address given by the first defendant in the agreement and also in his letter dated 1 July 2002 to the plaintiff. Clause 14(b) of the agreement states, inter alia, that any writ of summons or originating process against the first defendant shall be deemed to have been given if sent to the first defendant by prepaid registered post at the address stated in the agreement and such summons or originating process sent by post shall be conclusively deemed to have been received by the first defendant within 72 hours after the date of such posting despite any evidence to the contrary.

[17] Clause 14(b) relied on by the first defendant herein is substantially in pari materia with clause 17 in *Amanah Merchant Bank Bhd*, where it was expressly stated that any notice 'may be served by sending the same through the post to the last known address of the person to be served and shall be deemed to be served on the day following that on which it is posted'. Mohamed Dzaiddin SCJ (later Chief Justice Malaysia) held, inter alia, that once the notice had been sent through the post in an

envelope addressed to the defendant's last known address, it was not necessary for the appellant-bank to show that the AR card had been duly acknowledged for there to have been effective service thereof. A

[18] In the instant appeal, there can be no doubt that service of the summons by way of prepaid AR registered post addressed to the first defendant is sufficient: O 7 r 1(1) of the Subordinate Courts Rules 1980; and *Wilken Sdn Bhd*, per Azmel Maamor J (now JCA). B

[19] I therefore find no substance in the submission presented for the first defendant. C

Return dates on the summons

[20] It was said for the first defendant that there were two return dates on the plaintiff's summons and in the absence of an explanation by the plaintiff, the first defendant was prejudiced, thereby rendering the judgment irregular, which should be set aside ex debito justitiae, referring to *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Berhad* [1996] 1 MLJ 30. D

[21] The plaintiff's response is that the first defendant could not be prejudiced as the plaintiff has obtained an order for substituted service and the latest return date of 29 September 1999 had been made known to the first defendant. E

[22] In my view, the first defendant's reliance on *Tuan Haji Ahmed Abdul Rahman*, is misconceived as different facts prevailed there, in that the plaintiff there had entered a judgment which was riddled with uncertainties as the interest rate was fluctuating and serious enough to render it an irregular judgment which was set aside: per Edgar Joseph Jr FCJ (as he then was) at p 253. F

[23] Having regard to the factual background, in particular the first defendant's negotiation with the plaintiff after the judgment, I am unable to sustain the submission for the first defendant that he has been prejudiced in relation to the return date. G

Conclusion

[24] I hold that the appeal is devoid of any merits and is hereby dismissed with costs. The trial judge's decision is affirmed. H

Appeal dismissed with costs.

Reported by Ezatul Zuria Azhari I